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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOSEPH PITTMAN, JR., DIANA) Civil No. 09-CV-1952-WQH(WVG)
12 PITTMAN,)
13)
14 Plaintiffs,) ORDER GRANTING DEFENDANT'S
15) MOTION FOR RECONSIDERATION
16 v.) (DOC. 26) OF ORDER TO PRODUCE
17) PORTIONS OF INTERNAL FILES
18) (DOC. 23)
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17 Pending before the Court is defendant, County of San
18 Diego's ("County"), motion for reconsideration (Doc. No. 26) of
19 the Court's order compelling production of documents (Doc. No.
20 23). Specifically, the County objects to the Court's determina-
21 tion that documents bearing Bates numbers Sheriff 0001832-0001845
22 and Sheriff 0001851-0001870 are not protected by the attorney-
23 client privilege or work-product doctrine. After considering new
24 facts the County presented for the first time here, the Court
25 GRANTS the motion.

26 **I. FACTUAL SUMMARY**

27 County Counsel is charged with representing the County and
28 its various subdivisions and departments in all legal affairs.

1 County Counsel's role includes primary responsibility for investi-
2 gating administrative claims for damages against the County.

3 Plaintiffs in this case tendered a claim that arose from
4 their confrontation with San Diego Sheriff Deputies on the evening
5 of October 19, 2008. County Counsel received and handled the
6 evaluation and disposition of the claim.

7 On February 20, 2009, a non-attorney, Mary Ann Wiggs of the
8 County Counsel's Claims Division, sent the Sheriff's Department a
9 request for the Sheriff's "comments" on the claim. (Bates Nos.
10 Sheriff 001844-45.) The letter advised the Sheriff to mark his
11 response as "Attorney Client Communication" and advised that
12 "[a]ny investigative efforts you now take and your analysis of the
13 facts are in anticipation of litigation." (Id.)

14 On February 25, 2009, Lieutenant Margaret Sanfilippo of the
15 Sheriff's Division of Inspectional Services forwarded the request
16 to the Commander and Captain in charge of the Sheriff's Lemon
17 Grove substation for their "recommendation regarding settlement."
18 (Bates No. Sheriff 001843.)

19 On March 19, 2009, the Sergeant assigned to review the
20 matter and make a recommendation completed and submitted a highly
21 detailed report that included the Sergeant's evaluation of the
22 underlying incident and recommendation regarding the outcome of
23 the plaintiffs' claim. (Bates Nos. Sheriff 001840-42, Sheriff
24 001851-71.)

25 On March 24, 2009, Lieutenant Sanfilippo wrote Ms. Wiggs
26 and made a recommendation regarding the Pittmans' claim. (Bates
27 No. Sheriff 001835.)
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1 On March 30, 2009, Ms. Wiggs sent an e-mail requesting
2 Joseph Pittman's full medical records on a compact disc. (Bates
3 No. Sheriff 001833.)

4 On April 1, 2009, Lieutenant Sanfilippo forwarded Ms.
5 Wiggs's request to the Sheriff's Medical Services Division.
6 (Bates No. Sheriff 001832.)

7 On April 14, 2009, a Sheriff's Detentions Supervising Nurse
8 prepared a very superficial report of Mr. Pittman's medical
9 treatment in jail. (Bates Nos. Sheriff 001836-39.)

10 On April 15, 2009, the Division of Inspectional Services
11 forwarded the medical report to Ms. Wiggs. (Bates No. Sheriff
12 001834.)

13 The lead or title document in each submission was marked
14 either "Confidential," "Attorney Client Confidential," or "Attor-
15 ney Client Communication."

16 **II. LEGAL STANDARD**

17 **A. Motions For Reconsideration**

18 The Court has discretion to reconsider interlocutory orders
19 at any time prior to final judgment. Hydranautics v. Filmtec
20 Corp., 306 F. Supp. 2d 958, 968 (S.D. Cal. 2003); Washington v.
21 Garcia, 977 F. Supp. 1067, 1069 (S.D. Cal. 1997); Cal. v. Summer
22 Del Caribe, Inc., 821 F. Supp. 574, 577 (N.D. Cal. 1993) (cita-
23 tions omitted). "Such motions may be justified on the basis of an
24 intervening change in the law, or the need to correct a clear
25 error or prevent manifest injustice." Cal., 821 F. Supp. at 577
26 (citing Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d
27 364, 369 n.5 (9th Cir. 1989)). "To succeed in a motion to recon-
28 sider, a party must set forth facts or law of a strongly convinc-

ing nature to induce the court to reverse its prior decision."
Id. (citations omitted).

As the Fifth Circuit explained, "the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." McKethan v. Tex. Farm Bureau, 996 F.2d 734, 738 n.6 (5th Cir. 1993) (quoting Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990)). Ultimately, the decision on a motion for reconsideration lies in the Court's sound discretion. Navajo Nation v. Norris, 331 F.3d 1041, 1046 (9th Cir.2003) (citing Kona Enters. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000)).

B. Work-Product Doctrine

The so-called work-product doctrine, as embodied in Federal Rule of Civil Procedure 26(b)(3), broadly applies to documents prepared by the "parties' attorney, consultant, surety, indemnitor, insurer, or agent." Fed. R. Civ. P. 26(b)(3)(A).

In order to qualify for work-product protection, the asserting party must show that the withheld materials are: (1) documents or tangible things; (2) prepared in anticipation of litigation or for trial; and (3) the documents or tangible things were prepared by or for the party or the attorney asserting the privilege. See id.; In re Cal. Pub. Util. Comm'n, 892 F.2d 778, 780-81 (9th Cir. 1989).

"At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities

1 of litigation in our adversary system. One of those realities is
2 that attorneys often must rely on the assistance of investigators
3 and other agents in the compilation of materials in preparation
4 for trial. It is therefore necessary that the doctrine protect
5 material prepared by agents for the attorney as well as those
6 prepared by the attorney himself." United States v. Nobles, 422
7 U.S. 225, 238-39 (1975); see also In re Grand Jury Subpoena, 350
8 F.3d 1010, 1015 (9th Cir. 2003).

9 Nevertheless, the protection afforded by the doctrine is
10 qualified and may be overcome if the party seeking disclosure
11 shows that the materials are otherwise discoverable under Rule
12 26(b)(1) and that "it has substantial need for the materials to
13 prepare its case and cannot, without undue hardship, obtain their
14 substantial equivalent by other means." Fed. R. Civ. P.
15 26(b)(3)(A)(i)-(ii).

16 **C. Attorney-Client Privilege**

17 The attorney-client privilege "exists to protect not only
18 the giving of professional advice to those who can act on it but
19 also giving of information to the lawyer to enable him to give
20 sound and informed advice." Upjohn v. United States, 449 U.S.
21 383, 390 (1981). Courts have found that investigation is impor-
22 tant part of an attorney's legal services to a client. United
23 States v. Rowe, 96 F.3d 1294, 1296-97 (9th Cir. 1996).

24 "[A] party asserting the attorney-client privilege has the
25 burden of establishing the [existence of an attorney-client]
26 relationship and the privileged nature of the communication."
27 United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (quot-
28 ing United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997)).

1 An eight-part test determines whether information is covered by
2 the attorney-client privilege:

3 1) Where legal advice of any kind is sought (2) from a
4 professional legal adviser in his capacity as such,
5 (3) the communications relating to that purpose, (4)
6 made in confidence (5) by the client, (6) are at his
instance permanently protected (7) from disclosure by
himself or by the legal adviser, (8) unless the pro-
tection be waived.

7 Id. (quoting In re Grand Jury Investigation, 974 F.2d 1068, 1071
8 n.2 (9th Cir. 1992)).

9 II. DISCUSSION

10 A. The Court Accepts The New Facts Presented For the First 11 Time in the Reconsideration Motion

12 Although the County presented facts in support of its
13 privilege and work-product doctrine claims for the first time in
14 its motion for reconsideration, the Court exercises its discretion
15 to consider those facts in the interest of judicial economy and in
16 light of the importance of the issues.

17 B. Work-Product Doctrine

18 All of the documents under reconsideration in some way
19 relate to Plaintiffs' pre-litigation claim tender and County
20 Counsel's request for the Sheriff's evaluation and input. How-
21 ever, the Court evaluates only the ultimate products of County
22 Counsel's requests, the Sergeant's report (Bates Nos. Sheriff
23 001840-42, Sheriff 001851-71) and Medical Services Division report
24 (Bates Nos. Sheriff 001836-39), under the work-product doctrine.
25 The remaining document pages (Bates Nos. Sheriff 001832-35,
26 001843-45) are more aptly categorized as "communications" and will
27 be evaluated under the attorney-client privilege doctrine.

28 / / /

1 **1. The Reports Were Created Under Counsel's Direction**

2 Based on the County's explanation of the chain of communi-
3 cations that led to the reports' creation, it is clear that both
4 reports were prepared at the request and direction of the County's
5 attorney. The Court next turns to whether the reports above were
6 prepared "in anticipation of litigation."

7 **2. The Reports Were Made In Anticipation of Litigation**

8 Because the reports at issue were prepared before litiga-
9 tion and during the claim tender phase, the Court must decide
10 whether reports prepared to accept or deny a claim are prepared
11 "in anticipation of litigation." Based on the facts of this case,
12 the Court finds that the reports were so generated.

13 Central to the work-product doctrine is the requirement
14 that the documents under its umbrella be "prepared in anticipation
15 of litigation." Fed. R. Civ. P. 26(b)(3)(A). Under Ninth Circuit
16 law, a document meets this requirement if it was prepared "because
17 of the prospect of litigation." In re Grand Jury Subpoena, 357
18 F.3d 900, 908 (9th Cir. 2003) (emphasis added). A document
19 satisfies Rule 26(b)(3) under this standard if, under the totality
20 of circumstances, "it can fairly be said that the 'document was
21 created because of anticipated litigation, and would not have been
22 created in substantially similar form but for the prospect of that
23 litigation[.]'" Id. at 908 (quoting United States v. Adlman, 134
24 F.3d 1194 (2d Cir. 1998)). While it is true that not every claim
25 against the County will result in a lawsuit, "the fact that [a
26 party] conducts an investigation into claims against [it] . . . as
27 a matter of routine does not necessarily mean that the investiga-
28 tion is not being conducted in anticipation of litigation, if

1 other factors are present." Garcia v. City of Imperial, ____
 2 F.R.D. ____, 2010 WL 306289 at *4 (S.D. Cal. Aug. 2, 2010) (citing
 3 Spaulding v. Denton, 68 F.R.D. 342, 345 (D. Del. 1975); 6 Moore's
 4 Federal Practice - Civil at ¶ 26.70[3][a] (Matthew Bender 3d ed.)).

5 On February 9, 2009, the Pittmans' attorney submitted a
 6 claim notice to the County in the form of a letter. (Motion,
 7 Exhibit A.) The Pittmans' notice included their detailed version
 8 of events and concluded as follows: "The amount of this claim for
 9 each of the Claimants individually exceeds ten thousand dollars
 10 (\$10,000) and *when* it is filed in court it will be filed as an
 11 unlimited case seeking in excess of \$1,000,000." (Exhibit A at 5
 12 (emphasis added). The Court finds notable the letter's use of
 13 "when," which essentially put the County on notice that the
 14 Pittmans would file a lawsuit if their claim was denied, instead
 15 of "if," which would have made the prospects of future litigation
 16 much less certain. Thus, at the time County Counsel sought the
 17 Sheriff's investigation and evaluation of the allegations and
 18 claim, the County reasonably anticipated that the Pittmans would
 19 file a lawsuit seeking more than \$1,000,000 if their claim was
 20 denied--the Pittmans warned the County as much from the beginning.

21 In light of the Pittmans' letter, County Counsel's request
 22 to the Sheriff served a dual purpose. It simultaneously sought
 23 the Sheriff's opinion on the active claim and requested that the
 24 Sheriff "help the County Counsel assess the County's civil liabil-
 25 ity." (Motion at 11:1.) It is not relevant that an active
 26 lawsuit was not pending when the reports were made, as it is
 27 sufficient that litigation was reasonably anticipated under the
 28 totality of the circumstances. In re Grand Jury Subpoena, 357

1 F.3d 900, 908 (9th Cir. 2003). The Court finds that the reports
2 were created in anticipation of litigation.

3 The Court further finds that the reports would not have
4 been created in substantially similar form but for the prospect of
5 litigation. The Pittmans assert that the reports were created
6 during the ordinary course of business. However, Lieutenant
7 Sanfilippo declares that the Department of Inspectional Services
8 "would not initiate such an internal review and investigation
9 without a request from County Counsel." (Sanfilippo Decl. at
10 ¶ 6.) In other words, claim and litigation reviews and recommen-
11 dations are not part of the Sheriff's daily operations, as County
12 Counsel, not the Sheriff, has primary responsibility for handling
13 claims and litigation. Cf. Miller v. Pancucci, 141 F.R.D. 292,
14 303 (C.D. Cal. 1992) (finding that a report was created during the
15 course of a police department's business because the internal
16 affairs unit had been established partly with the purpose of
17 investigating tort claims).

18 The same is true for the Medical Services Division's
19 report, which bears the claim number and is essentially a bare-
20 bones summary of Mr. Pittman's routine, post-booking medical
21 processing, and which was derived from documents created at the
22 time of his processing. The Medical Services Division has no
23 other reason to create such reports during the course of its daily
24 business.

25 **3. The Reports Were Created By County Counsel's Agents**

26 Further, it is not relevant that the reports were not
27 prepared by County Counsel, but were prepared for County Counsel.
28 The Sheriff Sergeant and Supervising Nurse were both employees and

1 agents of the Sheriff's Department, a division of the County, and
2 were employees and agents of the County as a result. As such, the
3 reports were prepared by the County's employees and are eligible
4 for the doctrine's protection. See Fed. R. Civ. P. 26(b)(3)(A)
5 ("Ordinarily, a party may not discover documents and tangible
6 things . . . by or for another party or its representative (in-
7 cluding the other party's attorney, consultant, . . . or agent).")
8 (emphasis added); Canel v. Lincoln Nat'l Bank, 179 F.R.D. 224, 227
9 (N.D. Ill. 1998) (memorandum prepared by bank officer analyzing
10 legal, factual, and financial issues raised by minority share-
11 holder suit was entitled to work product protection).

12 The Court recognizes that it previously found that these
13 reports were not protected based on its then assessment that they
14 were prepared in the course of the Sheriff's operations. However,
15 the Court was not previously privy to the sequence of communica-
16 tions and requests that led to their creation. When viewed alone
17 and without context, it is not self-evident that these documents
18 were created at County Counsel's request and outside the course of
19 the Sheriff's daily operations. Without proper context, these
20 reports originally appeared to be prepared within, and for, the
21 Sheriff's Department, as County Counsel's name does not appear on
22 any of them. However, with the benefit of additional information
23 and the proper context, it is evident that these reports were
24 generated during the course of legal representation and are
25 attorney work product.

26 **4. Plaintiffs Make No Showing Of Undue Hardship**

27 While it is true that work-product doctrine is not abso-
28 lute, the plaintiffs have made no showing whatsoever of undue

1 hardship or substantial need, as their pleadings simply do not
2 address the issue. See Fed. R. Civ. P. 26(b)(3)(A)(ii); Admiral
3 Ins. Co. v. United States District Court, 881 F.2d 1486, 1494 (9th
4 Cir. 1989) ("The primary purpose of the work product rule is to
5 'prevent exploitation of a party's efforts in preparing for
6 litigation.'"). All of the information in the reports is equally
7 available to the Pittmans, whether from the original arrest
8 reports, medical reports, or through witness depositions. The
9 reports contain no facts that are unique to them and which cannot
10 be obtained during the ordinary course of litigation and discov-
11 ery.

12 The reports here are distinguishable from arrest reports
13 and medical records that are ordinarily prepared at or near the
14 time of an incident. In general, the work-product doctrine does
15 not protect contemporaneously-prepared police reports or reports
16 that document the patient's then-existing ailments, diagnosis, and
17 treatment, as they were prepared at the time of injury when the
18 prospect of litigation was completely unknown. However, when
19 these reports are prepared months after the underlying incident,
20 after a claim has been filed, and after counsel has requested
21 them, they serve a different purpose. They no longer document
22 facts for the sake of documentation but rather review, evaluate,
23 and summarize facts and source reports with the ultimate purpose
24 of helping develop legal strategy.

25 **B. Attorney-Client Privilege**

26 Based on the reasons below, the Court next finds that
27 documents bearing Bates numbers Sheriff 001832-35 and Sheriff
28

001843-45 satisfy the attorney-client privilege's elements and are absolutely protected from disclosure.

First, the communications were made during the course of County Counsel's request for the client's input on how a claim should be handled. This qualifies as "legal advice of any kind."

Next, the County Counsel was acting as the County's legal advisor and the communications were made in County Counsel's capacity as such; the Sheriff is part of the County. And although Ms. Wiggs was not herself an attorney, she was acting in her capacity as a County Counsel employee. See United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

Next, the communications were made in confidence. Each communication is marked as confidential and there was full expectation that the communications would be kept confidential.

Next, the client, the County, is now insisting that the documents be kept confidential and from being disclosed.

Finally, there is no indication that the attorney-client privilege was waived by disclosure to third parties or in any other way.

V. CONCLUSION

Based on the foregoing, the Court GRANTS the County's motion for reconsideration and finds as follows:

(1) The document pages numbered Sheriff 001840-42, Sheriff 001851-71, and 001836-39 are protected from disclosure by the attorney work-product doctrine;^{1/} and

^{1/}

The Court is careful to note that while the work-product doctrine prevents the production of the reports themselves, the facts and witness identities within the reports are not protected if they are independently responsive to discovery requests and are themselves not independently privileged from disclosure.

